HONG CHUAN LAY

v.

DR EDDIE SOO FOOK MUN

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: W-02-398-1998]
24 NOVEMBER 2005

CIVIL PROCEDURE: *Appeal - Fact, findings of - Credibility of witnesses - Decision of trial judge - Weight to be given - Amenability to appellate interference - Medical negligence - Evidence of parties and inferences therefrom*

TORT: *Negligence - Medical negligence - Claim against surgeon for non-disclosure of risks of surgery - Whether sufficient advice on risks given to patient - Decision turning on facts - Tortious liability and proof - Evidence of parties and inferences therefrom - Credibility of witnesses*

This was an appeal by the plaintiff from the decision of the High Court dismissing his action in medical negligence against the defendant. The principal ground of appeal was that the trial judge had misdirected himself in holding that the plaintiff failed to prove that the defendant did not give him any or sufficient pre-surgical advice on the risks of the operation that was to be performed. In his judgment, the trial judge stated, "… I find that the defendant had explained and advised the plaintiff of the risks as described by him prior to the first operation … My conclusion is that what was informed and advised by the defendant to the plaintiff on the risk factor is comprehensive, adequate and sufficient".

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

[1] The trial judge was faced with two conflicting versions and it was clear that he preferred that of the defendant. It was also well within his right to be critical of the plaintiff with respect to the latter's viva voce evidence given in court. The trial judge was right about the plaintiff's credibility. (pp 867 f & 870 c)

[2] Cases of medical negligence are fact-sensitive. Everything turns on the credibility of the witnesses with regard to what was said or done or not said or not done. As such, the view formed by the primary trier of fact is entitled to great weight, and an appellate court is not entitled to differ therefrom save in exceptional circumstances. (p 870 d)

[Orders of court below affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi yang menolak tuntutan kecuaian perubatannya terhadap defendan. Alasan utama rayuan adalah bahawa hakim bicara telah tersalah arah akan dirinya apabila memutuskan bahawa plaintif gagal membuktikan bahawa defendan tidak memberikan sebarang nasihat pra-bedah berkaitan risiko yang dihadapi atas pembedahan yang akan dilakukan. Dalam penghakimannya, hakim bicara menyatakan, "… Saya dapati bahawa defendan telah menerangkan dan menasihati plaintif akan risiko-risiko sepertimana yang dijelaskannya sebelum pembedahan pertama … Rumusan saya adalah apa yang diberitahu dan dinasihati oleh defendan kepada plaintif berhubung faktor risiko adalah komprehensif, mencukupi dan memadai".

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

[1] Hakim bicara berhadapan dengan dua versi bertentangan dan adalah jelas bahawa beliau memilih versi yang diutarakan defendan. Adalah juga menjadi hak beliau untuk bersifat kritikal terhadap plaintif berkaitan keterangan viva vocenya yang diberikan di mahkamah. Hakim bicara seterusnya betul dalam dapatannya mengenai kebolehpercayaan plaintif.

[2] Kes-kes kecuaian perubatan adalah sensitif kepada fakta. Semuanya berkisar pada kebolehpercayaan saksi-saksi berhubung dengan apa yang dikata atau dibuat atau tidak dibuat. Oleh yang demikian, pandangan yang diambil oleh pengadil fakta utama harus diberi penghormatan sewajarnya, dan sesebuah mahkamah rayuan tidak boleh menyimpang darinya kecuali dalam keadaan-keadaan yang istimewa.

Perintah mahkamah dibawah disahkan.]

Case(s) referred to:
Hong Chuan Lay v. Dr Eddie Soo Fook Mun [1998] 5 CLJ 251 HC ***(refd)***
Khoo Sit Hoh v. Lim Thean Tong [1912] AC 323 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 42

For the appellant - Ranjit Singh; M/s T/n Cheang & Ariff
For the respondent - MS Dhillon (Karen Arumugam with him); M/s PS Ranjan & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S2 (S5)-23-133-1990]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:
This appeal is brought by the plaintiff whose action for medical negligence brought against the defendant was dismissed by the High Court. The appeal was part heard by a panel comprising us and our learned brother Mohd Saari Yusoff, JCA and adjourned to a date for continuation of argument. In the meantime, our learned brother retired. We then had this appeal re-listed before us for continued argument pursuant to s. 42 of the Courts of Judicature Act 1964, as amended. At the conclusion of the plaintiff's submissions we reserved our decision on whether it was necessary to call upon counsel for the defendant. After carefully considering the submissions, written and oral, made in support of the appeal and after anxiously scrutinising the record of appeal, it is our view that the plaintiff has not succeeded in showing that the court below was wrong and that we may now dismiss this appeal without calling upon counsel for the defendant. We may add that we do not propose to regurgitate the facts because they have been sufficiently set out in the judgment under appeal which is reported in [1998] 5 CLJ 251.

The main complaint of the plaintiff is that the trial judge misdirected himself on the facts by failing to hold that the plaintiff had proved that the defendant had given no pre-surgical advice on the risk of the operation that was to be performed. On this point all we need do is to reproduce the following passage in the judgment of the learned judge:

> The plaintiff did not deny that the defendant had advised him on the risk of the operation. His only complaint is that the inherent risk was not disclosed to him, and had he knew of it, he would not have undergone the operation; the circumstances of which I have explained earlier. He elaborated that the plaintiff assured him that the operation to be undertaken was a normal surgery that would cure the numbness of his fingers, and that he will be discharged after two weeks subsequent.

The defendant confirmed that the risk of the operation was told to the plaintiff. He had included in his advice that the operation undertaken is a major surgery with possible injury to the spinal cord or spinal nerves that may result in paralysis of the plaintiff, or the death of the plaintiff at the operating table, or even worsening of the plaintiff's then symptoms. Besides these risks, he informed the plaintiff of the nature of the operation and the benefits of it. The benefits are: a relief of the plaintiff's then symptoms and a stop or slow down in the plaintiff's deteriorating condition.

With these two conflicting versions, I have to firstly decide whether the risk is a material risk inherent in the proposed treatment, and then whether the elaboration of the risk was actually uttered or was it restricted to that as claimed by the plaintiff, followed by whether the contents of the information and advice is adequate and sufficient.

On the first issue, I find that the risk involved in the first operation was a material risk. The plaintiff was then a lorry driver. In such an occupation he required a great deal of movement. Paralysis, even partial, will substantially affect his occupation. He must have been aware of this, and attached significance to it. To my mind, this would have been the reaction of a reasonable person in the plaintiff's position. As a material risk, the defendant must make it known to the plaintiff. Was this being done? The analysis of the second issue will provide the answer.

It is always necessary in a contest of directly opposing versions of what actually took place, to examine the circumstantial evidence tendered in order to arrive at a finding, based on the balance of probability, as to who should be believed. To a large extent, the honesty of the parties will be an important criteria.

Beginning with the plaintiff, I find many instances of exaggerations and contradictions in his evidence. The following are some.

When confronted with the 'Star' newspaper report that he used a motorcycle as a means of transport for his weekly physiotherapy treatment at the hospital, the plaintiff initially denied that he could ride on such a vehicle. However, when cautioned by the court to tell the truth, he meekly admitted that the three-wheeled motorcycle was purchased by his son for him to ride on his own. This will imply that he is not as immobile as he wished this court to believe, since getting on and off the motorcycle and to move around therefrom demands his personal effort, though, may be, assisted by certain aids, such as a foldable walker.

The second instance involves the plaintiff's association with the defendant subsequent to the first operation. The plaintiff has denied categorically that he never met up with the defendant again after his first surgical experience. But the defendant has produced his doctor's notes to show that the plaintiff had consulted him professionally on a number of occasions after the first operation. In fact, the defendant was the person who arranged for the plaintiff's fourth

operation by the eminent surgeon, Dr Max Arbi. I do not believe the defendant's doctor's notes are a fabrication, nor was there any challenge by the plaintiff that they are.

The plaintiff has denied that he gave a history of his illness to the defendant before the first operation more than that of a complaint of numbness in his fingers on both hands. But this is contradictory to that of the defendant's doctor's notes which records: the plaintiff has weakness of his limbs, walk with an unsteady gait, loss of appetite, abdominal discomfort and insomnia. Most of what is recorded by the defendant are confirmed in Dr C T Tan's letter to the defendant dated 29 November 1984. Besides, this is the same history shown in the General Hospital doctor's notes after the plaintiff was admitted to this medical institution following his discharge from the defendant's care. It could not have been there unless the plaintiff revealed it to them. These documentary evidence corroborate the defendant's claim of a more serious medical history than what was uttered by the plaintiff.

During cross-examination of the plaintiff, the plaintiff asserted that Dr Kazem informed him that 'what the defendant did was wrong.' This must be in relation to the treatment performed by the defendant on the plaintiff. However, when asked to comment on this assertion, Dr Kazem denied categorically that such statement was ever made by him to the plaintiff. This is a direct contradiction to the plaintiff's claim.

I can hardly be convinced that a patient will agree to undergo an operation of his 'neck' in a medical centre under general anaesthesia for just numbness of his fingers. The plaintiff's medical symptoms must have been more than what he claimed and sufficiently serious to warrant his consideration to desire an operation. This must be reflected by his evaluation of the circumstances over a period of time before agreeing to the operation. For this assessment, he must have considered a risk factor in an operation. And what risk factor can be evaluated unless being the advice of one by the defendant. The record in Dr C T Tan's letter that the plaintiff 'had agreed about the surgery', and the defendant's doctor's notes stating that the plaintiff 'wanted the operation' display appraisal before a decision and this, on the balance of probabilities, must have included the consideration of the risk.

On the defendant's testimony I find no material discrepancies. His demeanour is straight forward and I have no reason to doubt the truth of what he said.

By *(sic)* the reasons stated above, **I find that the defendant had explained and advised the plaintiff of the risks as described by him prior to the first operation.** Having made this finding, I shall now consider the third issue, that of the sufficiency and adequacy of the risks so disclosed to the plaintiff by the defendant.

> On the third issue, surprisingly, though the plaintiff has stressed on this factor, no medical evidence was called upon to argue that what was informed and advised by the defendant to the plaintiff was inadequate and insufficient. Deprived of this, I can only rely on what was presented, and consider it in the light of all other evidence adduced. **My conclusion is that what was informed and advised by the defendant to the plaintiff on the risk factor is comprehensive, adequate and sufficient.**
>
> With these findings, I am of the opinion that the plaintiff has failed in his claim against the defendant for negligence under this *(sic)* provision. (emphasis added.)

Now these passages make it clear that the trial judge had two conflicting versions before him and that he preferred the defendant's version. He was also critical of the plaintiff whom he observed whilst giving evidence. That was well within his province. And, reading the printed note of the evidence taken down by the judge we are in agreement with the adverse view formed by him about the plaintiff's credibility.

Cases of medical negligence are, in the main, fact sensitive. And in a case of this sort where everything turns upon the credibility of witnesses about what was said or not said or done or not done, the view formed by the primary trier of fact is entitled to great weight and we as a court of appeal are not entitled to differ save in an exceptional case. And this is not an exceptional case.

In our judgment the present case is amply covered by what Lord Robson said when delivering the advice of the Board of the Privy Council in *Khoo Sit Hoh v. Lim Thean Tong* [1912] AC 323:

> The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the courts who deal with later stages of the case.

For the reasons already given the appeal is hereby dismissed. The orders made by the court below are affirmed. The plaintiff must pay the costs of this appeal to the defendant.